

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-160

KARLA ZELAYA,

Claimant/Putative Dependent of Decedent Roxana Zelaya–Respondent,

v.

CLEVELAND CONSTRUCTION COMPANY AND AMERICAN ZURICH INSURANCE,

Employer/Insurer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Nata K. Brown
AHD No. 12-178, OWC No. 678598

Mark T. Krause, Esquire, for the Petitioner

Steven R. Kiersh, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HENRY W. MCCOY, AND HEATHER C. LESLIE,² *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

In a Compensation Order issued August 31, 2012 by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES), it was found that on March 16, 2011, Roxana Zelaya (Decedent) was killed at age 37 in a forklift accident while working for Cleveland Construction Company (Cleveland). The ALJ also found that at the time of her death Decedent resided with her 23 year old daughter and the claimant herein,

¹ Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Judge Leslie was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

Karla, and daughters Rosa Zelaya (age 20) and Sarahi Valladeres Guevara (age 5) in an apartment they shared with Decedent's parents, Blanca and Jose Zelaya. It was also found that Decedent was also survived by a daughter, Giselle Molina (age 13), but there was no finding that Giselle resided with Decedent.

It was also found that Decedent paid one third of the rent on the apartment, being \$400, which payment included payment for Karla's housing, with the remainder being paid by Blanco and Jose Zelaya. In addition, it was found that at the time of her death in March 2011, Decedent provided Karla's food, clothing and all her financial support.

It was also found that since June 18, 2010, Karla has received \$502 per month from the Social Security Administration as a result of being deemed a mentally disabled adult, incapable of working. It was found that the money was electronically deposited into an account in Karla's name, and that Karla would withdraw money from the account and give it to Decedent to apply towards purchases made on Karla's behalf. There were no specific findings regarding how much if any of these funds were put towards Karla's food or clothing, or if any portion was used for Decedent's contribution towards the rent.

Although no specific finding was made concerning who claimed Karla as a dependent in tax years 2009, 2010 or 2011, the ALJ accepted for the purpose of her analysis and holding that Decedent did not claim Karla as a dependent in those tax years. Those assumptions are supported by copies of Decedent's (and her estate's) tax returns, EE 1, 2 and 3.

Base upon these findings, the ALJ found that Karla was entitled to death benefits under D.C. Code §32-1509 (3). Cleveland appealed that determination to the Compensation Review Board (CRB).

We affirm.

STANDARD OF REVIEW

The scope of review by the CRB is generally limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

D.C. Code §32-1509 provides:

If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

...

(3) If there be 1 surviving child of the deceased, but no widow or widower then for the support of that child 50% of the wages of the deceased; and if there be more than 1 surviving child of the deceased, but no widow or widower then for the support of such children, in equal parts 50% of such wages increased by 16 2/3% of such wages for each child in excess of 1; provided that the total amount payable shall in no case exceed 66 2/3% of such wages.

D.C. Code §32-1501 (5) defines “Child” such that it “includes only persons who are [...] [u]nder 18 years of age, and also persons who, though 18 years of age or over, are substantially dependent upon the deceased employee and incapable of self-support by reason of mental or physical incapacity.” The ALJ determined that Karla is “incapable of self-support by reason of mental or physical incapacity”; that status was not challenged at the time of the formal hearing and is not challenged in this appeal.

Further, none of the findings of fact set forth in the Background section above (except that of Karla’s being substantially dependent upon Decedent at the time of Decedent’s death) are challenged in this appeal.

Cleveland’s arguments on appeal are that (1) the ALJ “disregarded” the fact that Blanca Zelaya claimed Karla as a dependent on her 2009 and 2010 Federal Income Tax returns, (Memorandum of Points and Authorities in Support of Application for Review, page 5) and (2) Karla had her own source of income, Social Security Disability Income (SSDI) and “received the majority of her additional financial support from her grandmother [Blanca Zeyala] and not her mother [Decedent]” (Memorandum, page 6).

Regarding argument number 2, Cleveland cites no record or evidentiary support for what amounts to a mere bald assertion which is contradicted on page 5 where Cleveland acknowledges that “Roxana Zelaya [Decedent] purchased food and clothing for Karla and paid \$400 per month toward the total family rent of \$1,292; with \$200 per month intended to be for Karla, and \$200 per month intended to be for Roxana.” There is no similar reference to any specific contributions towards Karla’s support that were attributable to Blanca or Jose Zelaya at the time of Decedent’s death, and there are none in the Compensation Order. Further, we have reviewed Blanca Zelaya’s testimony, and with the exception of stating that she or her husband would sometimes take Karla places where she had to go, there is no testimony that anyone other than Decedent contributed to Karla’s financial well being prior to Decedent’s death.

Regarding the first point, Cleveland is wrong in asserting that the ALJ “disregarded” its argument about the dependent tax deduction. The ALJ did not disregard it, she merely rejected it. On page 5, she wrote:

Employer argues that [Decedent] did not claim Claimant as a dependent on her 2009, 2010, or 2011 taxes (EE 1,2,3); therefore, Claimant was not substantially dependent upon the deceased employee. Substantial dependence of an adult child, however, is not determined by who may or may not claim the dependent adult child on an income tax form. It is determined by showing that the adult child is substantially

dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability.

The preponderance of the evidence—the testimony of Roxana Valladares, Blanca Zelaya, and the medical evaluation of Dr. Rice, supports Claimant’s claim that she was substantially dependent upon the deceased employee, Ms. Zelaya. Claimant was incapable of self-support by reason of mental disability. Her ability to obtain gainful employment or to live independently is severely impaired. After paying \$200 of the \$502 in monthly SSDI [Social Security Disability Income] benefits that Claimant receives to her grandmother for rent, she is left with \$302, which is insufficient to support her needs—including but not limited to, food, transportation, and personal items. Based on the foregoing, Claimant meets the requirements for entitlement to death benefits.

Compensation Order, page 5.

While the ALJ did not specifically frame the tax deduction issue as whether the fact that Blanca Zelaya took the deduction in 2009 and 2010 meant that Karla was substantially dependent on Blanca Zelaya, she did frame the issue properly: “Substantial dependence of an adult child [...] is not determined by who may or may not claim the dependent adult child on an income tax form.” Such facts may be relevant, and if Cleveland points to evidence of expenditures on Karla’s behalf made by Blanca, the fact that Blanca took the tax deduction might be corroborative of those expenditures, if they were in dispute. However, review of the testimony of Blanca Zelaya reveals that at no time did she ever testify that she or anyone else other than Decedent or the Social Security Administration contributed anything to Karla’s support at the time of the Decedent’s death.

While the above quoted portion of the Compensation Order could be faulted for phrasing the issue in terms of Karla’s current circumstances rather than couching the discussion in terms of the circumstances as they existed at the time of the death, the argument and analysis is the same: \$502 per month is now and was then inadequate to support Karla, and prior to Decedent’s death, all the remainder of her support, at least on this record, was provided by Decedent. And, while we would have used the words “by who *did* or *did not* claim” rather than “who may or may not claim”, the ALJ’s point is clear, and correct. Neither we nor the ALJ have sufficient information before us or proper legal competence to adjudicate who is or is not entitled to take such a deduction, or to what degree a family unit comprised of three or four related, working adults, a disabled adult and a minor child might assign a dependent deduction in a way most advantageous to the family unit as a whole.

As Cleveland points out in its memorandum, there are no reported cases in this jurisdiction that define what is meant by “substantially dependent”, but in light of the fact that there does not appear to be any dispute in this case that Karla is indeed substantially dependent on someone, despite her SSDI income, the facts that (1) Decedent undeniably provided Karla with substantial support both before and after the commencement of SSDI in June 2010, and (2) the absence of evidence of any such support coming from any source other than Decedent, renders the finding of dependency supported by substantial evidence and in accordance with the law.

CONCLUSION AND ORDER

The determination that Karla Zelaya was substantially dependent upon Roxana Zelaya at the time of Roxana Zelaya's death on March 16, 2011 is supported by substantial evidence, and is in accordance with the law. The Compensation Order of August 31, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 10, 2012
DATE